THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable R. Scott Sprouse
Circuit Court Judge

Appellate Case No.: 2024-000057
Circuit Court Case No.: 2019-CP-04-01942

Natalie Zitek, individually, and on behalf of all others similarly situated,

Plaintiff,

v.

D.R. Horton, Inc., Jane Doe #1-10; and John Doe #1-50,

Defendants,

and

D.R. Horton, Inc.,

Third-Party Plaintiff,

v.

A&J Framing, Inc.; A-z, Inc.; AJ Landscaping & Grading, LLC, a/k/a AJ Landscaping & Grading, LLC; Allpro Textures, LLC; Alpha E.M.C.; Alpha Omega Construction Group, Inc.; American Concrete and Precast, Inc., a/k/a ACP Concrete, Inc.; Atlanta Floor Designs Center; A Grade Above Others, LLC; BFK Builders, Inc.; BMC East, LLC d/b/a Coleman Floor, LLC; Brand-Vaughn Lumber Co., Inc.; Bravo Carpenters, Inc.; Builders Designhouse, LLC; Builders FirstSource Southeast Group, LLC, a/k/a Builders FirstSource, Inc.; Builders Services Group, LLC, f/k/a Masco Contractor Services Central, Inc., f/k/a Gale Industries, Inc., d/b/a Gale Contractor Services; Cannaday Siding & Gutter, Inc.; Caryl Mechanics II, Inc., a/k/a Caryl

Mechanicals, Inc.; CBU Enterprises, Inc.; Cortes Painting, LLC; CPI Security Systems, Inc.; Dom Group, LLC; Dupree Plumbing Company, Inc.; Ferguson Enterprises, Inc.; Five Star Construction, Inc.; Five Star Foundations, LLC; Galloway-Bell, Inc., a/k/a Galloway-Bell, Inc. II; GBS Building Supply – US LBM, LLC, f/k/a GBS Building Supply, Inc.; General Shale Brick, Inc.; Get Floored, LLC; Greener Pastures, Inc., a/k/a Greener Pastures of Aiken, LLC; Installed Building Products, LLC, a/k/a Installed Building Products II, LLC; IBP Asset, LLC, d/b/a/ Blue Ridge Building Products; JLS Masonry, Inc.; Kings Landscaping, LLC; L&M Products, Inc; Long Heating & Air Conditioning, Inc.; M&L General Construction, LLC; M&M Foundations, LLC; Manale Landscaping, LLC; MJ Cowboys, LLC; Nazareth Builders, LLC; NM Contractors, LLC; Poinsett Development, LLC; Poinsett Homes, LLC; P&L Enterprises, LLC; P&T Construction, Inc., a/k/a P&T Construction, Inc.; ProBuild Company, LLC, a/k/a ProBuild Holdings, Inc.; Rite Rug Co.; Rodney Howard Grading, Inc., a/k/a Rodney Howard Grading Co.; Sandlapper Concrete, LLC; Silver Line Building Products Corporation; Sodfather, Inc.; Landscape Contractors; Stock Building Supply, LLC; Topbuild Home Services, Inc., a/k/a Gale Contractor Service; Tucker Materials, Inc., a/k/a Gypsum; UTM Enterprises, Inc.; and Willow Tree Landscpaing, Inc.,

Third-Party Defendants,

and

Aaron D. Peris; Harrelson Painting, LLC; Huttig Building Products,

Fourth and Fifth Party
Plaintiffs and Defendants,

Of whom

JLS Masonry, Inc., is the

Appellant,

v.

Natalie Zitek, individually, and on behalf of all others similarly situated and as assignee of the claims of Third-Party Plaintiff D.R. Horton, Inc.,

Respondents.

INITIAL BRIEF OF RESPONDENTS

Justin O'Toole Lucey, Esquire
SC Bar No.: 15438
Dabny Lynn, Esquire
SC Bar No.: 78703
Charlotte Winckler, Esquire
SC Bar No.: 105887
JUSTIN O'TOOLE LUCEY, P.A.
415 Mill Street
Mount Pleasant, South Carolina 29464
(843) 849-8400
(843) 849-8406 (fax)
jlucey@lucey-law.com
dlynn@lucey-law.com
cwinckler@lucey-law.com
Attorneys for the Respondents

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STATEMENT OF ISSUES ON APPEAL

I. WHETHER JLS ABANDONED ANY CHALLENGE IT MAY HAVE HAD TO THE $15,000,000 VERDICT AGAINST HORTON, RENDERING MOOT ITS DECERTIFICATION AND DISMISSAL ARGUMENTS AS TO PLAINTIFFS' CLAIMS AGAINST HORTON

II. WHETHER JLS WAIVED ITS ABILITY TO CHALLENGE THE $4,000,000 VERDICT AGAINST IT BY FAILING TO OBJECT TO THE JURY CHARGES AND VERDICT FORM

III. WHETHER JLS' ARGUMENTS ARE BARRED BECAUSE EITHER THEY ARE WAIVED, ABANDONED, UNPRESERVED OR MOOT DUE TO JLS' PROCEDURAL FAILURES

IV. WHETHER THE TRIAL COURT CORRECTLY DECIDED THE FOUR ARGUMENTS JLS MAY HAVE PRESERVED (SOL, DAMAGES, SETTLEMENT DISCLOSURE, AND DECERTIFICATION) BASED ON THE LAW AND THE FACTS

V. WHETHER JLS OTHER ARGUMENTS FAIL ON THE MERITS ANYWAY EVEN IF THEY HAD BEEN PROPERLY PRESERVED

VI. WHETHER THE AMPLE EVIDENCE PRESENTED AT TRIAL OTHERWISE SUPPORTS THE $4,000,000 VERDICT AGAINST JLS

STATEMENT OF THE CASE

This case is a construction defect class action involving 220 single-family homes within the Rose Hill subdivision in Easley, South Carolina. The homes were all built by D.R. Horton ("Horton") and its subcontractors, including JLS, who installed the brick and stone at 46% of the homes. (Trial Trans. II. 867:8-12). The brick and stone started to crack and separate from the homes and these improper conditions, among others, are what led the homeowners ("Plaintiffs") to file a putative class lawsuit against Horton in 2019. (Initial Complaint).

The case was certified as a class action and designated complex. (Order Granting Plaintiff's Motion for Class Certification); (Order Granting Horton's Motion to Establish Complex Case Designation). Horton also brought claims against 59 of its subcontractors as Third-Party

Defendants who, in turn, brought in 3 of their subcontractors as Fourth-Party Defendants (collectively "subcontractors"). (Horton's Second Amended Answer & 3rd Party Complaint); (3rd Party Subcontractors' Answers & 4th Party Complaints).

The case cumulated in a two-phase trial that took place in Anderson County before the Honorable Judge Sprouse between September 5-15, 2023 per an unchallenged Trial Plan Order. (Trial Plan Order). Phase I of the trial involved the Plaintiffs' claims against Horton[1] and Phase II of the trial involved Horton's claims against all the subcontractors. *Id*. The same jury decided both Phases. *Id*.

During Phase I of the trial, after Plaintiffs rested and argued directed verdict motions, Horton settled with Plaintiffs, re-tendered its defense to the subcontractors, and assigned Plaintiffs its subcontractor claims and related rights. (Trial Trans. II. 697:17-699:17). All other subcontractors then reached settlements with the Plaintiffs except JLS; and these settlements were placed on the record in JLS's presence. JLS refused to defend Horton for the remainder of Phase I and, instead, requested "to be allowed to put up a brief opening…call [it's] witnesses and…shut this thing down," thus causing the referenced "collapse" of Phase I into Phase II. (Trial Trans. II. 723:13-16).

The trial of Horton's claims against JLS then proceeded largely without objection or exception. JLS agreed to call its witnesses first and allowed Plaintiffs as Horton's designee to follow. (Trial Trans. II. 741:24-742:3). Plaintiffs and Horton had previously stipulated 99% of Plaintiffs' exhibits into evidence during Phase 1, without objection by JLS. Plaintiffs' jury charges

[1] All subcontractors were permitted to fully participate in this Phase; however, most did not, choosing instead to allow ample evidence of serious brick and stone defects to be admitted without objection. This evidence is detailed in the below Statement of Facts.

were also submitted and charged without any objection from JLS. (Trial. Trans. II. 868:8-11). JLS did not provide its own proposed verdict form and ultimately agreed to a revised version of Plaintiffs' pretrial verdict form, which contained "Contractual Indemnity", "Equitable Indemnity", and "Breach of Implied Warranty" causes of action. (Trial Trans. II. 869:17-24).

The jury returned a verdict in favor of Plaintiffs in the amount of $15,000,000 on Plaintiffs' negligence claim against Horton, and a verdict in favor of Plaintiffs on its assigned Horton claims in the amount of $4,000,000 on Horton's breach of implied warranty claims against JLS. (Trial Trans. II. 934:7-22).

JLS now appeals several Orders allegedly "denying its written and oral Motions" made before, during, and after trial; however, JLS mischaracterizes the nature of these Motions and Orders as well as the Trial Court's rulings on the same. (Notice of Appeal). Nearly all of the arguments in JLS' 45-page Brief are precluded from this Court's consideration because (1) JLS waived or abandoned them; (2) JLS never procured a ruling by the Court on them, or (3) JLS failed to raise them at all or otherwise at the appropriate time.

STATEMENT OF THE FACTS

A.) Pre-Trial Matters

Plaintiff and Class Representative, Natalie Zitek, filed her Complaint against Horton on September 25, 2019, alleging negligence/gross negligence and breach of implied warranties. (Initial Complaint). Horton filed its Amended Answer and Third-Party Complaint against its subcontractors on March 11, 2021, alleging negligence/gross negligence, breach of implied warranties, breach of express warranties, breach of contract, contractual indemnity, and equitable indemnity. (Horton's Second Amended Answer and Third-Party Complaint).

The Class was certified on January 27, 2021. (Order Granting Plaintiff's Motion for Class Certification). JLS does not appeal this Order. The case was then designated as complex on March 16, 2022. (Order Granting Complex Case Designation). JLS also does not appeal this Order.

JLS filed a written Motion to Decertify the class on June 23, 2023 ("June 2023 Decertification Motion"). This is the only pre-trial Order included in JLS' Notice of Appeal.[2]

B.) <u>The Trial Plan Order</u>

The court entered an Order on August 17, 2023 ("Trial Plan Order") that indicated that this case would be tried in two phases: the first phase decided Plaintiffs claims against Horton and the second phase decided Horton's claims against its subcontractors. JLS did not move to reconsider this Order and does not appeal this Order. (Notice of Appeal).

C.) <u>Phase I of the Trial</u>

Phase I of the trial involving Plaintiffs' claims against Horton spanned from September 5 to September 13, 2023.

On Tuesday, September 5, 2023, jury selection occurred. Following jury selection, Plaintiffs and Horton gave opening statements to the jury. In Horton's opening statement, Horton's counsel took "responsibility" for the defective stone veneer that exists throughout Rose Hill and

[2]JLS' Record Designation includes other pre-trial Motions and Orders that are irrelevant to this appeal because either JLS did not make the Motions or did not include the Orders deciding these Motions in its Notice of Appeal. These irrelevant Motions and Orders include:

1) 6/23/23 JLS' Motion for Summary Judgment (JLS Brief, p. 7);
2) 6/23/23 JLS Motion to Bifurcate (JLS Brief, p. 7);
3) 7/11/23 JLS Motion for Joinder and Partial Summary Judgment (JLS Brief, p. 7);
4) 7/26/23 Order Denying JLS Motion for Summary Judgment (JLS Brief, p. 7);
5) 8/7/23 JLS Motion to Reconsider Order Denying Summary Judgement (JLS Brief, p. 7); and,
6) 8/18/23 Order Denying all Motions to Reconsider (JLS Brief, p. 7).

conceded to the existence of code violations. (Trial Trans. I. 48:4-50:7). JLS did not object to any portion of Horton's opening.

Plaintiffs' first witness, Horton's expert Steve Moore, was called on September 6th. (Trial Trans. I. 73:12-13). Steve Moore testified as to "hundreds" of building code violations and defects existing in the stone and brick walls of these homes, including: (a) missing movement joints at garage lintel brick areas; (b) improperly fastened wall ties; (c) insufficient flashing; (d) missing and misplaced weep holes; (e) inadequate stone clearance; (f) stone directly adhered to brick; and (g) exposed lath and torn weather barriers at stone-clad walls. Steve Moore also testified as to the duties of Horton's subcontractors including the duties to (a) comply with their contracts; (b) follow building code requirements; (c) review and report design errors or omissions; and (d) ensure that their work is defect free. (Trial Trans. I. 86:9-87:4).

Plaintiffs' second witness, Class Representative Natalie Zitek, was called on September 7th. (Trial Trans. I. 312:21-22). Mrs. Zitek testified to the loose stone veneer, cracking brick veneer, and cracking concrete at her home, which she noticed in late 2019 after Horton repaired her home four times between 2013 and 2018. (Trial Trans. I. 329:11-344:14). Mrs. Zitek also testified she was concerned for her home and her and her family's health due to falling stones, separating brick, and potential radon exposure. (Trial Trans. I. 363:14-364:3; 361:17-22).

JLS moved to decertify the class following Mrs. Zitek's testimony but the Trial Court found that JLS took her testimony out of context and denied the Motion. (Trial Trans. I. 459:1-10).

Plaintiffs' third witness, Horton's Warranty Manager Pam Williamson, was then called by publication. (Trial Trans. I. 479:2-7). Ms. Willamson testified Horton fixed all known construction issues before it left the neighborhood. (Williamson Depo. Trans. 71:24-72:10). This included repairing Mrs. Zitek's "warranty" issues at her home. (Williamson Depo Trans. 237:8-17).

Plaintiffs' fourth witness, JLS's 30(b)(6) representative Christopher De La Torre, was called by publication[3] immediately after Ms. Williamson. (Trial Trans. I. 480:4-7). JLS admitted it performed flat work, stonework and brick work at Rose Hill. (De La Torre Depo. Trans. 19:9-20:13).

JLS also admitted that it would not point out design flaws or omissions to Horton (De La Torre Depo. Trans. 75:9-76:9); it was unfamiliar with applicable masonry codes and standards (De La Torre Depo. Trans. 76:25-77:3; 115:2-11); and it did not know if the wall ties were proper and that expert photos showed flashing that did not extend to daylight. (De La Torre Depo. Trans. 79:4-9; 80:17-18; 86:9-21; 112:8-21). JLS further admitted that the flashing at the garage lintel was incorrect and that the "mortar slop" was excessive behind these homes' brick clad walls. (De La Torre Depo. Trans. 113:1-11; 120:25-121:5). JLS also agreed that the stone adhered to brick should not be separating and that it had no idea how this defective condition could be fixed. (De La Torre Depo. Trans. 131:11-17).

Plaintiffs' fifth witness, expert Dr. Rhett Whitlock, was called on September 8th.[4] (Trial Trans. I. 493:2-3). Dr. Whitlock was qualified as an expert in engineering, building envelopes, forensic evaluation, and repair estimation without objection. (Trial Trans. 512:18-20).

Dr. Whitlock testified that these homes commonly contained many building code violations and other defective conditions, which resulted in damages such as cracking, separation, potential radon exposure, and water intrusion, and require circa $30,000,000[5] to repair. (Trial

[3] JLS failed to make any objections or counter-designations to this publication within the Court's pre-trial deadlines, or when JLS was called as a witness, or during its publication.
[4] Plaintiffs' sixth witness was Horton employee John Martin, who conceded that the stone veneer construction had been improperly performed.
[5] The repair cost estimate was modified from time to time at trial to eliminate some issues/damages from the trial which had been settled out.

Trans I. 674:9-14). Thousands of Dr. Whitlock's photos showing building code violations and resulting damage were stipulated into evidence and discussed at length during Dr. Whitlock's and other witnesses' testimony. (Trial Trans. I. 515:2-531:3; 560:3-611:24; 643:22-656:13). According to Dr. Whitlock, it was Horton and its subcontractors who were responsible for these problems and their repair costs. (Trial Trans. II. 829:19-835:10).

Plaintiffs' seventh witness, homeowner Courtney Scheutz, was called on September 12th.[6] (Trial Trans. II. 219:13-14). Ms. Scheutz testified that she was hit in the head by falling stones that were improperly adhered directly to brick above her garage. (Trial Trans. II. 233:10-21).

Plaintiffs' ninth and tenth witnesses, Horton employees Brian Keith Waddell and Edmond Jeanfreau,[7] were called on September 13th. (Trial Trans. II. 453:2; 594:10-12). Both Mr. Waddell and Mr. Jeanfreau testified to Horton's reliance on its subcontractors to know the code and do their work in compliance with the code and industry standards. (Trial Trans. II. 456:19-25; 796:14-19).

Plaintiffs' eleventh witness, homeowner Heather Ray, testified about multiple issues she had at her home, including brick cracks above her garage and falling stone.[8] (Trial Trans. II. 608:1-18).

In addition to these witnesses, Plaintiffs entered multiple exhibits that related to the stone, brick, and concrete ("masonry") work performed by JLS and repairs to JLS' work made by Horton. These exhibits include:

1. Pl. Ex. 1.8, JLS Subcontract
2. Pl. Ex. 1.9, JLS Purchase Agreement
3. Pl. Ex. 4.3, JLS Purchase Orders
4. Pl. Ex. 11.16, JLS Warranty Service Work Orders

[6] Plaintiffs' eighth witness was expert Andy Sherard relating to drainage issues.
[7] Mr. Jeanfreau was called via publication in Plaintiffs' case during Phase I and called live in the assigned Horton case during Phase II.
[8] Plaintiffs' twelfth and final witness, called after Ms. Ray, was Horton employee Jay Henderson.

5. Pl. Ex. 15.3, Horton Standard Details (showing sealing of concrete cracks)
6. Pl. Ex. 24.16, Whitlock Repair Cost Estimate
7. Pl. Exs. 24.20D, 25.31, Whitlock Stone Photos
8. Pl. Exs. 24.20C, 25.27, Whitlock Brick Photos
9. Pl. Exs. 25.17, 25.19, 25.28, 243, Whitlock Concrete Photos
10. Pl. Ex. 32.14, Structural Engineer Email to Horton about Repairs to JLS' Work
11. Pl. Ex. 53, 54, Structural Engineer Emails to Plaintiffs about Investigating JLS' Work
12. Pl. Ex. 55-57, Plaintiffs' Photos of Horton's Repairs to JLS' Work

JLS did not object to any of the above witness testimony and exhibits, or otherwise participate in Phase I, other than joining in on some of Horton's repetitious Motions to decertify the class, all which were denied. (Trial Trans II. 709:12-710:23).

D.) <u>Close of Plaintiffs' Case and Directed Verdict Motions</u>

After six days of Phase I testimony, Plaintiffs rested on the afternoon of September 13th. (Trial Trans. II. 629:16).

On September 14, 2023, JLS filed a cursory Motion for Directed Verdict ("DV") as to Horton's claims against it on SOL, SOR and indemnification grounds.[9] (JLS's 9/14/23 Mot. for DV). JLS also filed a Supporting Memo which only argued SOL and SOR grounds. (JLS and MJ Cowboys, LLC's 9/14/23 Memorandum in Support of their Motions for Directed Verdict). This written Motion and Memo were never brought to the Trial Court's attention, and the Court did not rule on it.

On September 14, 2023, both Plaintiffs and Horton orally moved for DV on all claims between them. Part of Plaintiffs' DV Motion was based on Horton's own admissions during its opening statements of code violations and being responsible for the brick-to-stone defect at the

[9] This Motion was filed and signed by Elizabeth Martineau, attorney for one of JLS's insurance carriers, Erie, who settled with Plaintiff before the jury reached a verdict. The remaining JLS attorney, Jeff Ross, represents JLS's other carrier Selective Insurance.

Rose Hill homes. (Trial Trans. II. 631:24-632:4). Horton's DV Motion was based mainly on a lack of damages proven by Plaintiffs for all issues. (Trial Trans. II. 645:25-647:11). Horton then moved for decertification of the class once again. (Trial Trans. II. 659:13-659:22). JLS and other remaining subcontractors joined in on this Motion. (Trial Trans. II. 666:9-667:10).

E.) <u>Merger of Phase I & II</u>

On September 14, 2023, Plaintiffs and Horton reached a settlement agreement before the Court ruled on the foregoing DV Motions. (Trial Trans. II. 697:17-699:17); (Confidential Settlement Agreement). The confidential settlement between Horton and Plaintiffs included a payment by Horton to Plaintiffs, a covenant not to execute from Plaintiffs to Horton, an assignment by Horton of its Third-Party claims and related rights to Plaintiffs, and a tender of Horton's defense against Plaintiffs' claims to the remaining subcontractors. (Trial Trans. II. 698:4-699:14).

JLS asked the Court to disclose the settlement amount to the jury, but the Court denied this Motion. (Trial Trans. II. 702:10-24).

All other subcontractors then reached settlements with Plaintiffs, except JLS and M&M Foundations.[10] (Trial Trans. II. 703:5-23; 706:25-708:25). JLS proceeded to reject the tender of Horton's defense, and given the elimination of Horton's defense, the completion of Phase I was essentially consolidated with Phase II without objection.[11] (Trial Trans. II. 723:12-16).

[10] M&M Foundations ultimately settled with Plaintiff before the second set of opening statements.
[11] After the Horton settlement was put on the record, the court adjourned from time to time on the afternoon of September 14th for the parties to reorganized after the departure of Horton. When it became apparent that JLS would be the only active defendant left (M&M's participation had been non-existent until then), JLS announced it would not be putting on a defense for Horton and that it would proceed directly to call its witnesses.

F.) Completion of Trial

The remainder of the trial occurred on September 15, 2023, involving Horton's claims (now assigned to Plaintiffs) against JLS. Before opening statements on the remaining claims, JLS requested the Trial Court rule on the outstanding DV and Decertification Motions made by Horton. (Trial Trans. II. 709:1-7). The Trial Court denied both Motions. (Trial Trans. II. 709:12-711:13).

Plaintiffs requested the Trial Court then rule on Plaintiffs' DV Motion based on Horton's admissions during opening statements. (Trial Trans. II. 711:16-20). This Motion was granted as to the stone veneer defects at Rose Hill. (Trial Trans. II. 712:15-25).

JLS then moved to stay the case, arguing that the only claim at issue is Horton's contractual indemnity claim which is up on appeal. (Trial Trans. II. 726:4-727:3). The Court never ruled on this Motion and JLS failed to file a Rule 59(e) Motion asking the Court to so rule.

JLS also moved for disclosure of the confidential settlement amount between Plaintiffs and Horton again, arguing that the only damages that can be claimed against JLS are what Horton paid to settle, and Horton is now a sham defendant. (Trial Trans. II. 728:2-729:19). JLS' Motion was denied as to settlement disclosure:

> The jury is obviously aware DR Horton was contesting the case, and the jury is aware that DR Horton wants it settled, so the deceptive part of the case that the Court in the Poston case found there to be a sham defendant is not present in this case, and it can be distinguished from our situation, so I'm going to deny your motion, Mr. Ross.

(Trial Trans. II. 731:1-7).

Subsequently, JLS made yet another Motion to Decertify the class. The Court noted that this Motion was previously denied. (Trial Trans. II. 731:10-732:7).

Following opening statements, JLS proceeded to present its case first. JLS called one witness, expert Derek Hodgin. (Trial Trans. II. 742:4). Hodgin based his entire opinion on a single

one-hour visit to Rose Hill and photographs taken by others. (Trial Trans. II. 771:7-15; 775:13-15). Hodgin agreed with Plaintiffs' expert that all stone veneer throughout Rose Hill needed to be removed and replaced, but he disputed some of the brick and concrete repairs. (Trial Trans. II. 755:13-16; 761:24-762:3).

JLS did not call its damage estimator, any JLS representative, or any other witness. JLS' repair estimate was admitted into evidence without testimony. (Trial Trans. II. 784:4-9) JLS also stipulated that it was responsible for 46% of the masonry work at Rose Hill. (Trial Trans. II. 867:8-12).

In rebuttal, Plaintiffs called two witnesses, Dr. Whitlock and Horton employee Edmond Jeanfreau. Dr. Whitlock had been qualified as an expert in Phase I with no objection from JLS. (Trial Trans. I. 512:18-20). JLS did not make a single objection during nearly two days of testimony from Dr. Whitlock in Phase I. (Trial Trans. I. 493:6-681:22; Trial Trans. II 13:23-209:8).

At the close of evidence, the jury was left considering the testimony of fourteen witnesses and over 150 exhibits called and entered by Plaintiffs, and one witness and five exhibits called and entered by JLS.

G.) <u>Various Motions by Plaintiffs and JLS</u>

Prior to closing arguments, Plaintiffs moved for DV on the brick issues based on overwhelming evidence of code violations. (Trial Trans. II. 860:12-861:1). This Motion was denied. (Trial Trans. II. 861:11-12). JLS then moved for a dismissal based on Plaintiffs' failure to prove damages. (Trial Trans. II. 861:14-23). This Motion was denied. (Trial Trans. II. 861:24-862:2).

Plaintiffs moved for a complete DV on its claims against Horton, based on lack of evidence presented by Horton or JLS, arguing that the only remaining question for the jury was whether

Horton's liability should be extended to JLS. (Trial Trans. II. 862:6-17). This Motion was denied. (Trial Trans. II. 864:14-24).

At this time, JLS reargued for settlement disclosure based upon its sham defendant theory. This Motion was denied. (Trial Trans. II 863:19-864:7). JLS also moved for dismissal based on the SOL, which the Court denied. (Trial Trans. II. 864:25-865:23).

JLS then proceeded to make a different indemnity Motion, this time asking the Court to dismiss all claims pursuant to *Stoneledge.* (Trial Trans. II. 865:5-10). The Court did not rule on this issue and JLS never asked the Court to do so. (Trial Trans. II. 866:8-19). (JLS's counsel conceding the Court had not ruled on this issue).

JLS did not move for directed verdict upon SOR or make the Court aware of or argue the written September 14, 2023 DV Motion.

H.) <u>Closing Arguments, Jury Charges, Verdict Form and Verdict</u>

Prior to closing arguments, the Court conducted a charge conference with Plaintiffs' proposed charges (there were none proposed by Horton or JLS). The conference principally involved removing Plaintiffs' charges that were no longer relevant to the issues. JLS did not object to the amended charges at the conclusion of the conference or after they were charged to the jury. (Trial Trans. II. 869:23-24; 932:4).

The final verdict form that JLS agreed to removed "Negligence" and "Breach of Contract," but retained "Contractual Indemnity," "Equitable Indemnity," and "Breach of Implied Warranty" causes of action against JLS. (Verdict Form).

JLS acknowledged the Trial Court's ruling to not include SOL on the verdict form because SOL was not ripe at that time. (Trial Trans. II. 869:17-24) ("All right, I mean, I understand the Court's ruling.").

Subsequently, both parties gave closing arguments to the jury. Plaintiffs' closing argument highlighted the overwhelming evidence presented over the last two weeks of the masonry and concrete defects which JLS was admittedly 46% responsible. (Trial Trans. II. 871:5-889:6). Plaintiffs explained why JLS, a subcontractor, shared the liability for the defects with Horton, and asked the jury to award $9,200,000 from JLS—46%—of the requested $20,000,000 total sought in damages. (Trial Trans. II. 890:7-13).

In JLS' closing argument, JLS disclosed multiple times that a settlement had been reached between Plaintiffs and Horton. (Trial Trans. II. 901:3-7). JLS focused on why the jury should not rely on Dr. Whitlock's damage model instead of explaining why JLS's work was not defective. (Trial Trans. II. 892:17-893:1).

During deliberations, the jury proffered a question regarding the meaning of indemnity. The parties agreed to a charge on indemnity to be read to the jury. (Trial Trans. II. 927:13-934:5). After this charge, Plaintiffs, and one of JLS's carriers, Erie, placed a partial settlement on the record. (Trial Trans. II. 934:7-22).

Shortly thereafter, the jury came back with a verdict in favor of Plaintiffs in the amount of $15,000,000 on Plaintiffs' negligence claim against Horton, and a verdict in favor of Plaintiffs on its assigned Horton claims in the amount of $4,000,000 on Horton's breach of implied warranty claims against JLS. (Trial Trans. II. 935:9-936:12). The verdict was entered on September 19, 2023. (Jury Verdict).

I.) <u>Post-Trial Motions</u>

On September 22, 2023, JLS filed a Motion for Judgment Not Withstanding the Verdict ("JNOV") and/or New Trial. (JLS' JNOV Motion). In JLS' JNOV Motion, JLS improperly raised

grounds that had either not been raised in any DV Motion or not renewed at the close of all evidence.

On November 8, 2023, the trial court issued a Form 4 Order denying JLS' Motion for JNOV and/or New Trial. (Order Denying JLS' JNOV & Decertification).

On November 20, 2023, JLS filed a Motion to Reconsider pursuant to Rule 59(e) of the SCRCP. (JLS Rule 59(e) Motion).

On December 12, 2023, the trial court issued a Form 4 Order denying JLS' Motion to Reconsider. (Order Denying JLS' Motion for Reconsideration).

On January 11, 2024, JLS served its Notice of Appeal. According to this Notice, JLS appeals from the: (1) July 2023 Order Denying Decertification; (2) Trial Orders Denying Motions Made During Trial (several of which do not exist as explained herein); (3) $4,000,000 Judgment; and (4) Post Trial Orders Denying JNOV and Reconsideration.

STANDARD OF REVIEW

JLS made five Motions that were ruled upon by the Trial Court[12] and these Motions are: (1) JLS' Motions to Decertify; (2) JLS' Motion to Stay the case because of a non-existent appeal related to contractual indemnity; (3) JLS' Motions to Dismiss Plaintiffs' claims based on the SOL and Plaintiffs' damages; (4) JLS' Motions to Disclose Settlement between Plaintiffs and Horton; and (5) JLS' Motion for New Trial.

[12] *See also Lucas v. Rawl Family Ltd. P' ship.,* 359 S.C. 505, 510–11, 598 S.E.2d 712, 715 (2004) ("It is well settled that, but for a very few exceptional circumstances, an appellate court cannot address an issue unless it was raised to and ruled upon by the trial court.").

The Standard of Review applicable to all these Motions is an abuse of discretion standard.[13] This Court must affirm a Trial Court's ruling under this standard where there is any evidence in the record that supports the ruling. *Hueble v. S.C. Dep't of Nat. Res.*, 416 S.C. 220, 232, 785 S.E.2d 461, 467 (2016) ("An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions.").[14]

Even if JLS were able to prove that the Trial Court abused its discretion or otherwise committed a potentially reversable error in ruling on JLS' Motions, this Court will not reverse the jury's verdict unless JLS also proves resulting prejudice, *i.e.,* that there is a reasonable probability

[13] *See, e.g., Tilley v. Pacesetter Corp*., 333 S.C. 33, 43, 508 S.E.2d 16, 21 (1988) ("[A] trial court's ruling on whether an action is maintainable as a class action is within [the court's] discretion."); *Maryland v. Universal Elections, Inc*., 729 F.3d 370, 375 (4th Cir. 2013) (reviewing a motion to stay under the abuse of discretion standard); *Jenkins v. Dixie Specialty Co*., 284 S.C. 425, 427, 326 S.E.2d 658, 660 (1985) (finding a motion for a new trial is within the trial judge's discretion).

[14] JLS did not make a proper DV/JNOV Motion, but the standard of review that would be applicable is as follows: "When reviewing the [T]rial [C]ourt's ruling on a [JNOV Motion], this Court must employ the same standard as the [T]rial [C]ourt by viewing the evidence and all reasonable inferences in the light most favorable to the non-moving party." *RFT Mgmt. Co. v. Tinsley & Adams*, 399 S.C. 322, 331-332, 732 S.E.2d 166, 171 (2012). "The [T]rial [C]ourt must deny a [DV/JNOV] motion if the evidence yields more than one reasonable inference or its inference is in doubt." *Id*. (emphasis added). "JNOV Motions may be granted only if no reasonable jury could have reached the challenged verdict or there is no evidence to support the ruling below." *Crossley v. State Farm Mut. Auto. Ins. Co.*, 307 S.C. 354, 415 S.E.2d 393 (1992) (emphasis added). "When considering [JNOV Motions], neither the [T]rial [C]ourt nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence." *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (Ct. App. 2000) (citations omitted). "The Trial Court and the appellate court is only concerned with the existence of evidence, not its weight, and will not overturn a jury's verdict if any evidence exists that sustains the factual findings implicit in its decision." *Maybank v. BB&T Corp*., 416 S.C. 541, 571, 787 S.E.2d 498, 513 (2016), *reh'g denied*, (July 13, 2016) (finding the trial court correctly refused to grant JNOV because evidence existed that could support the verdict).

that the outcome was influenced by the error. *See, e.g., Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005).[15]

SUMMARY OF ARGUMENT

This Court should affirm the Trial Court because (1) JLS failed to challenge the $15,000,000 verdict against Horton; (2) JLS did not object to the jury charges or verdict form; (3) JLS asserts new arguments for the first time on appeal and failed to preserve its former arguments; (4) JLS' arguments fail on the merits even if preserved; and (5) the Trial Court's rulings are supported by the record and are not controlled by any error of law.

This Court should further affirm the $4,000,000 verdict against JLS because the only four grounds that JLS raised and Trial Court ruled on do not warrant disturbance because the Trial Court's rulings on these issues are supported by the law and the jury's verdict is supported by the evidence.[16]

As to the statute of limitations ("SOL"), this Court should affirm the Trial Court because:

1. JLS contractually extended the SOL for ten years and Horton's claims were brought within this time frame;

2. Even if the ten-year extension did not apply, JLS failed to present evidence that Horton was aware of any uncorrected defects associated with JLS' work before late 2019 and/or the evidence presented supports the jury's rejection of this affirmative defense;

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[15] There is no "*de novo*" or "constitutional" standard of review applicable here as JLS contends. (JLS Brief, pp. 16-17) (claiming that "this appeal presents a question of law" as to "the trial judge's interpretation of [Horton's] causes of actions against JLS" and the standard regarding jury instructions "is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution."). The *de novo* standard does not apply because the Trial Court never "interpreted Horton's causes of actions" against JLS. The "constitutional" standard does not apply because JLS never challenged any jury instruction and, even if it had, the applicable standard is not a constitutional one, but rather, abuse of discretion. *Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008) ("An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court committed an abuse of discretion.").

[16] These four grounds are the SOL, Plaintiffs' damages evidence, settlement disclosure, and decertification.

3. JLS failed argue SOL to the jury and failed to request or submit a special interrogatory asking the jury to decide the SOL question; and,

4. Evidence as to the SOL applicable to the homeowners is irrelevant as JLS has not filed any exceptions to Plaintiffs' verdict against Horton.

As to evidence of damages supporting the verdict, JLS admitted that it worked on 46% of these homes and this Court should find that this admission supports the jury's $4,000,000 verdict. This Court should further find that it was within the jury's – not the Trial Court's – purview to consider JLS' criticisms of Plaintiffs' expert's damage calculations in reaching this verdict.

As to JLS' exception relating to failure to disclose to the jury the amount of the Horton settlement, this Court should find that this is a moot point. The Trial Court made a point to note that the jury was aware of Horton's settlement and therefore *Poston*, the only case which JLS' argument relies, is inapplicable here.

As to decertification, JLS failed to appeal the January 2021 Order Granting Class Certification so that ruling stands; and, even if JLS had appealed this Order, there is evidence supporting Plaintiffs' satisfaction of all Rule 23 certification requirements.

The foregoing reasons each warrant this Court's affirmance of the Trial Court.

ARGUMENT

I. JLS Does Not Challenge the $15,000,000 Verdict Against Horton and This Moots JLS' SOL, Damages, and Decertification Arguments

This Court should sustain Plaintiffs' $15,000,000 verdict against Horton because JLS does not challenge this verdict.[17] (Notice of Appeal, p. 4) ("JLS appeals the following matters…Judgment rendered against [JLS] on September 19, 2023, as to D.R. Horton's claims against JLS. . .") (emphasis added). This portion of the jury's verdict is therefore the law of the case. *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("An unappealed ruling is the law of the case and requires affirmance.").

Plaintiffs' $15,000,000 verdict being the law of the case also moots the need for this Court to review the Trial Court's denials of JLS' Motions to (1) Decertify the Class and (2) Dismiss Plaintiffs' claims based on the SOL and Plaintiffs' damages. (Trial Trans. I. 468:1-8; Trial Trans. II. 731:25-732:2; 861:14-23; 865:1-5) (JLS arguing to dismiss Plaintiffs' Complaint – not Horton's Third-Party Complaint); (Trial Trans. I 459:2-10; Trial Trans. II 666:12-18) (JLS arguing to

[17] This verdict is independently relevant for multiple reasons including that Horton was only provided a covenant, not a release, so that Plaintiffs could avail themselves of Horton's other assigned rights and additional insured coverage. There is a pending declaratory judgment action in Greenville County between Horton and its subcontractors, including JLS, related to Horton's additional insured status under these subcontractors' insurance policies, wherein Horton has alleged:

> 54. Subcontractors each entered into. . .contracts with DRH to perform the Work ["Agreements"].
>
> 55. Pursuant to the Agreements, Subcontractors each agreed to list DRH as an additional insured under their [CGL] policies to guarantee DRH would be defended in the event alleged damages arose from the actions of the Subcontractor. . .
>
> 268. DRH was specifically named as an additional insured under the JLS Policies or otherwise qualifies as an additional insured under the JLS Policies…

Amended Complaint, *D.R. Horton, Inc. v. Am. Guarantee & Liab. Ins. Co.*, 2023-CP-01810 (Greenville Cnty., S.C. Ct. Com., Pl. Sep. 06, 2023).

decertify Plaintiffs' certified claims against Horton). Plaintiffs' claims against Horton cannot now be dismissed or decertified since an unchallenged verdict on these claims has been rendered. (Verdict Form); *see also* Rule 220, SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal").

II. JLS Cannot Challenge the $4,000,000 Verdict Against It Because JLS Did Not Object to the Jury Charges and Agreed to the Verdict Form

This Court should also sustain Horton's $4,000,000 verdict against JLS because JLS did not object to the jury charges or the verdict form submitted to the jury. (Trial Trans. II. 868:8-869:25) (JLS agreeing to jury charges); (Trial Trans. II 925: 16-18) (JLS responding that it only had one objection to the charges read to the jury related to the directed verdict against Horton which was cured by an additional instruction from the Trial Court); (Verdict Form).

The jury found JLS liable for breach of implied warranty and JLS cannot challenge this verdict as it was rendered on a verdict form which was agreed to by JLS. (Verdict Form); *see also Johnson v. Hoechst Celanese Corp*., 317 S.C. 415, 421, 453 S.E.2d 908, 912 (Ct. App. 1995) (appellant failed to preserve any issue relating to the verdict form by failing to object to a verdict form until after a liability verdict had been reached); *Ambruoso v. Lee*, No. 2010-UP-158, 2010 WL 10079451, at *4 (Ct. App. 2010) (unpublished) (holding that trial court did not err in finding defendant waived any objection to verdict form when it failed to do so prior to submitting form to jury); *see also* Rule 220, SCACR.

III. JLS' Appellate Arguments are Waived, Abandoned, Unpreserved, or Otherwise Procedurally Precluded

This Court should further find that JLS' procedural failures preclude it from considering all of JLS' arguments and should affirm every ruling JLS appeals as a result.

A. This Court Must Affirm the July 2023 Order Denying Decertification and the Denials of JLS' Other Decertification Motions

This Court must affirm the July 2023 Order Denying Decertification and the Denials of JLS' two Oral Decertification Motions[18] because JLS did not appeal the January 2021 Order Granting Class Certification. (Notice of Appeal); *see also Shirley's Iron Works*, 403 S.C. at 573, 743 S.E.2d at 785 ("An unappealed ruling is the law of the case and requires affirmance."). The 2021 Order Granting Class Certification cannot now be altered and therefore stands. *Davis v. Parkview Apartments*, 409 S.C. 266, 280, 762 S.E.2d 535, 542-43 (2014) ("As a matter of procedure. . .Appellants have only appealed. . .the Dismissal Order. As such, the merits of the underlying discovery orders. . .are not before us for consideration.") (emphasis added).[19]

B. There is No Order Denying Any JLS DV Motion Because JLS Did Not Make a Proper DV Motion at Trial

This Court should find that there are no "Denials" of any "DV Motions" for it to consider and JLS erred in including such "Denials" in its Notice of Appeal. (Notice of Appeal, pp. 3-4).[20]

Rather, the Trial Court ruled on only JLS' Decertification Motions and five, other oral motions made during trial (none of which were DV Motions) and only as to three grounds: (1) SOL; (2) Settlement Disclosure; and (3) Damage Evidence. The below chart is illustrative:

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[18]These Two Oral Motions include: (1) JLS' Joinder of Horton's Decertification Motion following the testimony of Natalie Zitek (Trial Trans. I 459:2-10); and (2) JLS' 2nd Joinder of Horton's Decertification Motion following Plaintiffs' and Horton's DV Motions (Trial Trans. II 666:12-18).

[19]JLS also did not appeal the August 2023 Order Denying Defendants' Motion to Reconsider the July 2023 Decertification Denial that JLS included in its Notice of Appeal.

[20] The non-existent Denials JLS listed in its Notice of Appeal include an Order "denying" JLS' "Motion for Directed Verdict" on "the basis of the SOL/SOR"; Order "denying" JLS' "Motion for Directed Verdict" "made immediately prior to the on-the-record settlement between Plaintiff[s] and M&M Foundations"; Order "denying" JLS' "Motion for Directed Verdict" "made following Plaintiff[s'] Motion for Directed Verdict"; Order "denying" JLS' "written Motion for Directed Verdict dated September 13, 2023." *Id.*

Oral Motion Made	**JLS' Request**	**Trial Court's Denial**
Order Denying JLS' 1st **Motion to Dismiss** Based on the SOL	"Ms. Zitek just testified that she had her brick replaced or addressed. . . before [JLS] was served in 2022…**[JLS] would ask to be dismissed** on the statute of limitation as well" (Trial Trans. I. 468:1-8) (emphasis added).	"[T]his is an unusual motion in that it's being made after Plaintiff testified rather than at the conclusion of Plaintiff's case. We have not heard all the evidence. . .[a]t this point I'm not going to dismiss the case or find that the statute of limitations applies". (Trial Trans. I. 471:4-24).
Order Denying JLS' **Motion to Disclose** the Settlement	"We've got a sham defendant right now in D.R. Horton. . .[**JLS wants to know] what did they actually pay"** (Trial Trans. II. 729:15-19) (emphasis added).	"I'm going to find that in this case that the settlement – the jury is aware of D.R. Horton's existence. . .so the deceptive part of the case that the Court found in Poston is not present…." (Trial Trans. II. 730:25-731:5).
Order Denying JLS' 2nd **Motion to Dismiss** Based on the SOL	"**The class representative is barred from bringing suit** by the statute of limitations" (Trial Trans. II. 731:25-732:2) (emphasis added).	"I've already ruled on that" (Trial Trans. II. 732:6).
Order Denying JLS' **Motion to Dismiss** Based on Damages Evidence	"[**JLS] would move to be dismissed**…[because]Plaintiffs cannot say…what the damages are. . .so, we would ask to be dismissed, since they have not established damages. (Trial Trans. II. 861:14-23) (emphasis added).	"I've heard the testimony, and the plaintiff's expert was able to articulate how he arrived at damages….so I would deny the Motion". (Trial Trans. II. 861:24-862:2).
Order Denying JLS' 3rd **Motion to Dismiss** Based on the SOL	**"[JLS] move[s], based on the [SOL] based on… [that] they knew of claims…** more than three 3 prior to filing suit." (Trial Trans. II. 865:1-5) (emphasis added).	"Again, the Court has heard the [SOL] argument, and I deny that Motion" (Trial Trans. II. 865:22-25).

C. This Court Cannot Consider the Denial of JLS' JNOV Motion and Related Rule 59(e) Motion as a Result

A DV Motion is a **prerequisite** for any JNOV Motion;[21] and, JLS' failure to make **and** renew a single DV Motion at the appropriate time during trial[22] **plus** the lack of any DV Denial procedurally bars this Court from considering JLS' JNOV Motion and related Rule 59(e) Motion because both Motions are a nullity under the law. *RFT Mgmt.,* 399 S.C. at 331, 732 S.E.2d at 170-71 (finding a party may move for JNOV only after a DV Motion is denied); *see also Wright v. Craft,* 372 S.C. 1, 20, 640 S.E.2d 486, 496 (Ct. App. 2006) ("When a defendant moves for a directed verdict. . .at the close of the plaintiff's case, he must renew that motion at the close of all evidence. . .Otherwise, this court is precluded from reviewing the denial of the motion on appeal. . . Because Craft did not renew his motion for a directed verdict at the close of all evidence, there is no JNOV motion to review.") (emphasis added).

JLS' failure to raise a proper DV Motion ends this entire appeal. *Id.* This Court cannot consider any of the grounds asserted in JLS' JNOV Motion and therefore cannot rule on any of JLS' appellate arguments that are based on these same grounds. Rule 220, SCACR.

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[21] Rule 50(b), SCRCP ("Whenever a [DV] motion made at the close of all the evidence is denied. . . .[a party] may move [for JNOV)") (emphasis added).

[22] Of these Motions, the only one labeled a "DV Motion" in the Trial Transcript is JLS' Motion to Decertify made at the close of the Plaintiffs' case. JLS, however, did not renew this Motion at the close of evidence and therefore it is not a valid "DV Motion". The only Motions JLS made during trial that it specifically renewed at the close of all evidence were its SOL and damages-related Motions, which are mooted because JLS did not challenge Plaintiffs' verdict against Horton.

D. Alternatively, This Court Must Affirm the Denial of 10 of 13 Grounds in JLS' JNOV Motion and Cannot Consider Six of JLS' Briefed Arguments

Even if this Court were to construe JLS' Motions to Stay, Dismiss, Decertify, and Disclose Settlement as DV Motions, it should still find that 10 of the 13 grounds JLS asserted in its JNOV Motion and 6 arguments JLS asserts in its Brief are unpreserved, including its:

- *Stoneledge* arguments (JLS Brief, pp. 20-24) (JNOV Motion, Ground 4);
- Standing arguments (JLS Brief, pp. 24-26) (JNOV Motion, Ground 10);
- SOR arguments (JLS Brief, pp. 26-29) (JNOV Motion, Ground 6);
- Due process and *de facto*-class defendant arguments (JLS Brief, pp. 29-35) (JNOV Motion, Ground 11);
- Bifurcation or Trial Plan arguments (JLS Brief, pp. 36-41) (Never Raised Before); and,
- Jury instruction arguments (JLS Brief, p. 41) (Never Raised Before).[23]

1. Stoneledge

JLS indemnification argument related to *Stoneledge* is unpreserved because the Trial Court never ruled on this issue[24] and JLS did not timely file a Rule 59(e) Motion asking the Trial Court to so rule.[25] *Lucas,* 359 S.C. at 510–11, 598 S.E.2d at 715 (2004) ("It is well settled that. . .an

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[23] JLS also abandoned six of its other JNOV grounds by failing to argue them in its Brief. *State v. Lindsey*, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011) ("An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority."); These abandoned grounds include: JLS Grounds 1, 2, and 3 concerning indemnification; JLS's Ground 7 concerning the plan and specification deficiencies; JLS's Ground 9 concerning evidence of masonry and concrete failures; and, JLS's Ground 13 regarding a set of plans that JLS entered in evidence. The Trial Court's denial of JNOV as to these grounds must be affirmed.

[24] JLS conceded this at trial:

> …I think I may want to make some modifications or some suggested changes with – so there's – and this depends on your ruling on the *Stoneledge* issue. . .**Now, your Honor hasn't ruled**. . .

Trial Trans. 242:21-243:7 (emphasis added).

[25] Rather, JLS filed a JNOV Motion under Rule 50 instead and thereafter filed a Rule 59(e) Motion related to its JNOV Motion on November 20, 2023.

appellate court cannot address an issue unless it was raised to and ruled upon by the trial court."). (emphasis added); *Walsh v. Woods,* 371 S.C. 319, 325, 638 S.E.2d 85, 88 (Ct. App. 2006) (finding issue on appeal was not preserved because the trial court did not rule on the issue and it was not raised in a Rule 59(e) motion).

2. SOR

JLS' SOR argument is unpreserved because JLS failed to make a single SOR argument at trial and the Trial Court never ruled on this issue. *Id*.

3. Standing

JLS' standing argument is barred because JLS first raised this ground in its JNOV Motion after the close of all evidence and judgment was entered. *James v. Anne's Inc*., 390 S.C. 188, 193, 701 S.E.2d 730, 732-33 (2010) ("[W]hen a party belatedly attempts to raise the issue of standing, our courts have applied error preservation principles and held that the matter was not preserved for review when the trial court was not given the first opportunity to rule on the issue.").

4. Due Process and De-Facto Class Defendant

JLS' "due process" and "*de-facto* class defendant" arguments are unpreserved for this same reason. *See, e.g., Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) ("Constitutional arguments are no exception to the preservation rules, and if not raised to the trial court, the issues are deemed waived on appeal."); *Grant v. S.C. Coastal Council*, 319 S.C. 348, 356, 461 S.E.2d 388, 392 (1995) (holding that a due process claim raised for the first time on appeal was not preserved).

Notably, JLS concedes in its Brief that it should have made all its "decertification" arguments before the $15,000,000 judgment against Horton was entered. (JLS Brief, p. 34) ("an objection to a class or an attempt to decertify a class may be raised at any point **before** a judgement

is rendered.") (emphasis added). Yet, JLS did not make its "due process" or "*de-facto* class defendant" arguments until its JNOV Motion filed after judgment.

5. Bifurcation and Trial Phasing

JLS' bifurcation and trial plan-related grounds are unpreserved because JLS failed to include the August 2023 Trial Plan Order in its Notice of Appeal. (Notice of Appeal); Rule 203, SCACR(d)(1)(B) and (e) (requiring appellants to list the orders they are appealing in their Notice of Appeal and to attach copies of the orders if reduced to writing).

Additionally, JLS agreed to the merger of Phase I and Phase II during trial so it has waived these arguments:

> Judge. . .procedurally, our plan is, we're going to collapse Phase I and Phase II together. I would like to be allowed to put up a brief opening, and then we'll call our witnesses and just shut this thing down. . .

(Trial Trans. II. 723:11-15); *see also CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 81 716 S.E.2d 877, 885 (2011) ("A litigant cannot concede an issue at trial and then raise it on appeal.").

6. Jury Instruction

JLS' jury instruction-related arguments are unpreserved because JLS agreed with these instructions and made no objections at trial that were not cured by the Trial Court. (Trial Trans. II. 925:18-926:24); *Hope Petty Motors of Columbia, Inc. v. Hyatt*, 310 S.C. 171, 175, 425 S.E.2d 786, 789 (Ct. App. 1992) ("The failure to object to a jury instruction makes the charge the law of the case.").

IV. The Four JLS Arguments that the Trial Court Ruled on Fail on the Merits

This Court should further find that the four arguments the Trial Court ruled on (SOL, Plaintiffs' Damages, Settlement Disclosure, and Decertification) were properly denied for the following reasons:

A. JLS' SOL Defense Fails Because JLS Contractually Extended the SOL to 10 Years; the Evidence (or Lack Thereof) Supports the Jury's Verdict; JLS Failed to Argue SOL to the Jury and Failed to Submit a Special Interrogatory Before or After the Verdict; and the Issue of Whether the SOL is Applicable to the Homeowners is Irrelevant as JLS Does Not Challenge Plaintiffs' Verdict Against Horton

1. JLS' Subcontract (Pl. Ex. 1.8) Extends the SOL By Ten (10) Years

JLS' Subcontract contractually extended liability to Horton for ten years:

> 8.2 Home Owners Warranty. In addition to the warranty in Paragraph 8.1, Contractor ***warrants*** that the Work shall remain free of defects ***for the following warranty periods*** beginning on the earlier of the date of occupancy by, or transfer of title from Owner to, the initial homeowner of the property on that is the subject of the Work: (i) for a period of **ten (10) years** all structural elements . . .
>
> Furthermore, notwithstanding the foregoing, Contractor agrees that **all express and *implied* warranties** shall remain in full force and effect **for so long as** Owner is obligated to warrant the Work pursuant to applicable law.

(Pl. Ex. 1.8) (emphasis added); *see also Anonymous Taxpayer v. S.C. Dep't of Revenue*, 377 S.C. 425, 440, 661 S.E.2d 73, 80 (2008) ("A party can waive a statute of limitations defense, but the waiver must be shown by words or conduct, including an **express agreement**.") (emphasis added).

Horton's claims against JLS brought in 2021 are well within this ten-year extended SOL window even using 2013 or 2014 as the SOL start date as argued, *albeit* incorrectly, by JLS. (JLS Brief, pp. 26-29).

2. No Evidence Exists That Shows Horton was Aware of Uncorrected Defects Within Three Years of its Third-Party Complaint Against JLS or, At Minimum, Multiple Inferences Exist as to When the SOL First Began to Run

Here, JLS maintains the SOL clock started ticking in 2014; however, the evidence shows that Horton had no reason to know that their final brick repair at the Zitek house had failed until Plaintiff filed this lawsuit in September 2019 and Horton filed its Third-Party Complaint less than three years later in March 2021.

In fact, Mrs. Zitek herself testified that she was unaware of any uncorrected brick, stone, or concrete issues "until 2019" when Dr. Whitlock inspected her home. (Trial Trans. I. 354:5-6). Horton testified similarly that it believed it had corrected all issues at Rose Hill through its warranty process and that it was "unaware" of *e.g.*, stone falling from these homes until after this lawsuit was filed. *See* (Williamson Depo. Trans. 71:24-72:10). Dr. Whitlock also testified that the code violations he documented were "latent" and not visible – if a homeowner cannot see an issue to report it, it can be inferred that no such report was made, and Horton was equally unaware of these hidden issues. (Trial Trans. I. 526:21-24; 567:18; 653:21).

This evidence establishes that Horton did not know it had a cause of action against its subcontractors regarding these common, latent defects until 2019. However, at minimum, the record contains sufficient evidence to render this a question of fact for the jury. As recently held by the South Carolina Supreme Court in *Walbeck*, *v. I'On Co., LLC*:

> Because the myriad of evidence adduced during this lengthy trial presented quintessential jury issues, we disagree with the court of appeals' reversal of the jury verdicts. **We find the trial court properly submitted Homeowners' claims and the issue of the statute of limitations to the jury, and we find its verdict was supported by the evidence**.

Walbeck v. I'On Company, LLC, 439 S.C. 568, 580, 889 S.E.2d 537, 543 (2023) (emphasis added); *see also Logan v. Cherokee Landscaping & Grading Co*., 389 S.C. 611, 618, 698 S.E.2d 879, 883 (Ct. App. 2010) ("If there is conflicting evidence as to whether a claimant knew or should have known he or she had a cause of action, the question is one for the jury.").

Walbeck was a trial that involved conflicting evidence as to when homeowners/HOA discovered a developer's failure to turn over certain, civic areas. *Walbeck,* 439 S.C. at 580.[26] The

[26] Class Counsel represented the I'On homeowners in *Walbeck*.

trial court found that the evidence created questions of fact as to the SOL; and left the jury to decide when the homeowners discovered their claims. *Id.* at 580. The jury ultimately found that the homeowners discovered their claims on August 5, 2009, and returned a $1,750,000 verdict in the HOA's favor. *Id.* at 579. The developer appealed and the court of appeals reversed the verdict, finding that the trial court erred in submitting the SOL question to the jury. *Id.* at 579. The South Carolina Supreme Court granted *certiorari* and overturned the court of appeal's SOL ruling and reinstated the HOA's verdict, finding that:

> We believe this case is similar in some respects to *Stoneledge at Lake Keowee Owners' Ass'n v. IMK Development Co., LLC*, 435 S.C. 176, 177, 866 S.E.2d 577, 578 (2021), **where the Court implicitly acknowledged that although defendants in that case may have had a colorable argument as to the running of the statute of limitations, this Court nonetheless affirmed the jury's verdict**. *See id.* ("Application of both the basic three-year limitations period and the discovery rule in any given case **can present factual issues for a jury to resolve**. ... [**W]e are constrained by our standard of review and conclude that under the facts of this case, there was a jury issue as to whether the statute of limitations had expired** by the time the action was commenced against [the defendant]"). In *Stoneledge*, the jury found in favor of the homeowners after the trial court denied defendants' motion for directed verdict based on the statute of limitations. **As is the case here, there was a question of fact as to when Homeowners were put on notice**.
>
> Because ample evidence was presented supporting the jury's determination of when Homeowners were on notice, the jury's verdicts are reinstated. **While there is an argument that the budgetary provision relied on by the court of appeals could have led to notice, the jury was cognizant of that argument but was convinced by the ample contrary evidence. That finding, because it was supported by sufficient evidence, should not have been overturned on appeal**. Accordingly, we find that these claims are timely.

Id. at 584 (emphasis added).

Just as in *Walbeck*, the evidence presented here created a question of fact as to when Horton discovered that it had a claim against JLS and the Trial Court did not err in finding the same.

3. JLS Failed to Argue SOL to the Jury and Failed to Submit a Special SOL Interrogatory After Verdict

JLS also cannot now argue that Horton's claims against it are barred by the SOL when JLS failed to argue the SOL as to Horton's claims to the jury and, by doing so, waived this defense. *Compare* (Trial Trans. II. 731:10-732:4) (arguing the SOL as to Plaintiffs' claims at trial) *with* (JLS Brief, pp. 27-28) (arguing the SOL as to Horton's claims for the first time and citing to JLS' unargued, unruled upon, Written DV Motion that was filed prior to JLS presenting its case and which only stated JLS moves for DV "on the basis of the [SOL]. . ."); *see also Mende v. Conway Hosp., Inc.*, 304 S.C. 313, 315, 404 S.E.2d 33, 34 (1991) (conduct that is inconsistent with the intention to insist on the SOL constitutes waiver of the defense).

JLS also failed to submit a SOL interrogatory for the jury before or after damages were determined for Plaintiffs' claims against Horton. *Holly Woods Ass'n of Residence Owners v. Hiller*, 392 S.C. 172, 191, 708 S.E.2d 787, 797 (Ct. App. 2011) ("Appellants waived appellate review [of trial court's failure to submit a special verdict form to the jury] because they failed to request a special interrogatory when the deciding jury was available. . .").

Even if JLS had properly submitted a special verdict form, "the question of whether to require a jury to return a special verdict is one committed to the discretion of the trial court." *Steele v. Dillard*, 327 S.C. 340, 343, 486 S.E.2d 278, 279 (Ct. App. 1997). In *Steele*, this Court found no error in the Trial Court's decision to deny a special verdict on comparative negligence requested by the defendant. *Id.* at 280. Not only was the use of a special verdict completely in the Trial Court's discretion, but the defendant also failed to show any prejudice because of the Court's refusal. *Id.* (quoting 5A C.J.S. Appeal & Error § 1762(b), at 1136 (1958)) ("Error in the refusal to

submit special interrogatories or special issues to the jury will constitute ground for reversal only if prejudice results to the complaining party.").

Like *Steele*, there is no error which warrants reversal here because JLS cannot show prejudice. The Trial Court correctly found that the SOL defense was only applicable to Horton based on the arguments JLS presented and JLS does not challenge Plaintiffs' verdict against Horton. (Trial Trans. II. 869:17-22) ("[T]he [SOL] would go toward the negligence claim against D.R. Horton"); (Notice of Appeal).

B. JLS' Damages Defense Similarly Fails Because JLS Conceded that it Worked on 46% of Homes and the Evidence Showed That These Homes Required Repair

JLS stipulated that it completed 46% of Plaintiffs' homes. Dr. Whitlock further testified that it was JLS' duty to comply with the Code; JLS worked on 46% of these houses; and he calculated 9.2M as 46% of the 20M he estimated was necessary for the stone, brick and concrete repairs. (Trial Trans. II 830:11; 830:19-25; 832:18-833:13; 833:25-835:20; 852:21-835:5; 855:6-10).

JLS' argument discrediting Dr. Whitlock's damage model and repair estimate is **not** a question of law that this Court needs to reconsider. (JLS Brief, pp. 42-43). Dr. Whitlock was qualified as an expert in "repair estimation" **without objection** from JLS (or Horton). (Trial Trans. I. 512:18-20). The accuracy of Dr. Whitlock's methodology, home classifications, and repair numbers was a question of fact for the jury and the jury decided that JLS was liable for $4,000,000 of the damages. *Pope v. Heritage Communities, Inc*., 395 S.C. 404, 425, 717 S.E.2d 765, 776 (Ct. App. 2011) ("We find no abuse of discretion. . .in admitting this [expert] testimony. . .[T]he court recognized Appellants' argument to exclude the testimony based on a belief that the damages suffered by each type of owner were different. The trial court found the basis of Appellants' attack

on DeSantis was the believability, rather than the admissibility, of his testimony. The court noted the different methodologies used by the parties' experts. . .The trial court found both methodologies to be appropriate measures of loss of use."). There is no error of law here and the evidence supports the verdict.

C. JLS' Disclosure Defense Fails Because Horton is an Assignor and Not a Sham Defendant and JLS Tried the Disclosure Issue By Consent

1. Poston Is Inapplicable to These Facts

This Court correctly ruled that the "deceptive" part of a sham defendant is non-existent here and properly excluded Plaintiffs' Covenant Not to Execute with Horton:

> [I]n my reading of the *Poston* case, … **the existence of the settlement itself was denied the jury in that case,** … as a result, the jury was denied information to which it was entitled …. **The amount of the settlement was not an issue**. . .**I'm going to find in this case that the settlement – the jury is aware of DR Horton's existence**. The jury is aware DR Horton was contesting the case, and the jury is aware that DR Horton wants it settled, so the deceptive part of the case that the Court in the Poston case found there to be a sham defendant is not present in this case, and it can be distinguished from our situation, so I'm going to deny [JLS's] motion.

(Trial Trans. II. 730:13-731:7) (emphasis added).

The well settled rule in South Carolina, as the Trial Court recognized, is that insurance and settlements should not be infused into a trial. Rules 408 and 411, SCRE. The infusion of insurance and settlements into a trial is extremely prejudicial and usually outweighs any probative value. *Id.; see also Pier View Condominium Association, Inc. v. Johns Manville, Inc.*, 2019 WL 13112011, *5-6 (D.S.C. 2009). ("[T]here is no reason, for the purposes of [S.C. Code Ann. § 15-38-50] to order the disclosure of the amount of the credit **until a verdict** finding liability on the part of [defendant] has been reached") (emphasis added) (internal citations omitted).

JLS is trying to overturn this traditional rule by relying on *Poston.* (JLS Brief, pp. 39-41). However, *Poston* involved a "deceptive," "secret" agreement that the jury was entirely unaware. *Poston v. Barnes,* 294 S.C. 261, 264 363 S.E.2d 888, 890 (1987).

Here, the jury was fully informed that Plaintiffs and Horton had resolved their differences, and that Horton's claim had been assigned to Plaintiffs. (Trial Trans. II. 897:10-12; 901:3-902:3).

The Trial Court therefore did not err in refusing to allow the amount of the settlement into evidence. In fact, the Court's ruling was consistent with Rules 408 and 411, SCRE, and the rulings of our Supreme Court following *Poston. See, e.g., Scott by McClure v. Fruehauf Corp*., 302 S.C. 364, 368, 296 S.E.2d 354, 356 (1990) (finding that defendants' reliance on *Poston* was "misplaced" where plaintiff released a tire manufacturer and proceeded to verdict against a trailer manufacturer and supplier because tire manufacturer's release did not affect the remaining parties' liability to plaintiff); *Vaughan v. City of Anderson,* 300 S.C. 55, 58, 386 S.E.2d 297, 299 (1989) (finding defendant "did not remain a defendant under the guise of a settlement agreement as described in *Poston*"); *Ackerman v. Travelers Indemnity Co.,* 318 S.C. 137, 146-47, 456 S.E.2d 408, 413 (Ct. App. 1995) (recognizing the validity of a Covenant Not to Execute similar to what Horton and Plaintiffs entered here).

2. JLS Got What It Asked for by Telling the Jury About Plaintiff and Horton's "Settlement"

As an additional sustaining ground, JLS told the jury about the settlement and cannot now argue judicial error in failing to disclose the same:

> [W]e got caught a little by surprise when D.R. Horton **settled** the case yesterday . . . But let's think about this, DR Horton, America's number one builder built this neighborhood, **settled out yesterday, and is now asking you to make my client pay them**. . .Again, this is not going to Plaintiff, but for the claims that have been assigned. **But we are talking about DR Horton against JLS . . . So, at the end of the day, guys, I would ask that you think about whether or not you're going**

to award damages against JLS at all, and then if you do, I would ask for a nominal amount.

(Trial Trans. II. 897:10-12; 901:3-902:3) (emphasis added).

The issue of settlement was therefore tried by consent to the jury. *See, e.g., Ellis v. Arkansas Louisiana Gas Co*., 609 F.2d 436, 439-40 (10th Cir. 1979), *cert. denied*, 445 U.S. 964 (1980) (noting implied consent is found where the parties recognized that the issue entered the case at trial and acquiesced in the introduction of evidence on that issue without objection); *McCurry v. Keith*, 325 S.C. 441, 481 S.E.2d 166 (Ct. App. 1997) (finding that a party waived right to challenge evidence when party referenced the evidence in opening statements).

3. JLS Cannot Prove Its Entitlement to Any Damage Reduction

Under the Horton agreement, Plaintiffs retained the right to allocate the settlement proceeds. Plaintiffs informed the Court that the proceeds were being allocated to issues other than brick, stone, and concrete. Therefore, JLS was not entitled to a damage reduction for the amount paid by Horton, and the failure to inform the jury of this amount is of no moment. *Palmetto Pointe at Peas Island Condo. Prop. Owners Ass'n, Inc.*, 440 S.C. at 204, 890 S.E.2d at 610 ("[a] plaintiff is entitled to allocate settlement funds in the most advantageous way to it, even if that may disadvantage a nonsettling tortfeasor").

4. Horton's Incapacity was Created by JLS

Finally, to the extent that Horton was a "sham" Defendant, this was a condition created by JLS. The JLS contract provided for JLS to defend and indemnify Horton. (Pl. Ex. 1.8). When Horton resolved the claims against it, Horton tendered its remaining defense to the remaining defendants, on the record. (Trial Trans. II. 701:14-702:6). JLS refused to accept the defense of

Horton. (Trial Trans. II. 723:11-16). It was JLS's refusal to accept the defense that led to Horton becoming a paper defendant.

D. JLS' Decertification Defense Fails Because the Evidence Supports the Trial Court's Finding that Plaintiff Satisfied Rule 23's Requirements; JLS is Misconstruing the Decertification Arguments Made to the Court; and JLS Points to No Authority Showing How it was "Impermissibly Treated as a Class Defendant"

1. The Evidence Supports the Trial Court's Denial of Decertification

This Court should find that the Trial Court did not err in denying JLS' Decertification Motions because at least some evidence supports the Trial Court's finding that Plaintiffs satisfied Rule 23's class certification requirements. (July 2023 Order Denying Certification); (Trial Trans. II 709:12-710:23) (finding that there was sufficient commonality and typicality to Plaintiffs' claims, along with other factors, supporting certification). The evidence includes:

- Neighborhood layouts showing that the class consisted of over 220 homeowners such that their joinder was impractical (Pl. Exs. 91 and 246);
- Hundreds of photographs showing common and typical defects throughout these homes (Pl. Exs. 24.12; 24.13; 24.20; 25.1; 25.3-25.8; 25.27-28; 25.31; 25.34);
- Plaintiffs' and Defendant's experts' testimony that common and typical building code violations existed throughout these homes (Trial Trans. I 515:2-532:3; 560:3-611:24; 643:22-656:13) (Trial Trans. II 755:13-16);
- Class Representative, Natalie Zitek's, testimony that she has and continued to fairly and adequately represent the class and seeks the same relief for herself and every other Rose Hill homeowner, *i.e*., the costs to repair their homes (Trial Trans. I 412:13-16); and,
- Plaintiffs' repair estimates which priced the cost to fix these defective conditions at more than $100 per home (Pl. Exs. 24.16; 24.31; 233).

2. JLS is Mischaracterizing its Decertification Arguments

This Court should further find that JLS is misconstruing the decertification arguments it made to the Trial Court. (JLS Brief, p. 35). Neither JLS nor any other subcontractor argued that

Plaintiffs "had not met [their] burden with respect to incorporating third- and fourth-party defendants into the class." *Id.* Rather, JLS "relied on and adopted" the arguments made by Horton and other subcontractors and these arguments all focused on whether Plaintiffs satisfied Rule 23's requirements. *Compare* (2023 Decert. Motion, p. 2) ("[JLS] relies and adopts the arguments set forth in [Horton's, Harrelson Painting, and NM Alex Carpet's] Motions for Decertification.") *with* (JLS Brief, pp. 29-35) (making arguments never raised to the Trial Court). The Court ultimately found that Plaintiffs had satisfied these requirements and issued its July 2023 Order Denying Decertification. (July 2023 Order Denying Decertification).[27]

The only other decertification argument JLS advanced prior to the end of this case that the Trial Court ruled on concerned a portion of Natalie Zitek's testimony where she stated "she could not speak for the class" as to their homes' Zillow value. *See, e.g.,* (Trial Trans. I. 421:3-6). JLS claimed that made her an inadequate representative. (Trial Trans. II. 666:12-18). However, the Trial Court correctly rejected this argument:

> The Court would note that in context that statement was regarding potential sale and value of properties put on the real estate market. I went back and looked at that, and that, in context, does not disqualify her from representing the class as class representative on these claims that were made before the Court. So, with that noted for the record, I would deny the motion for recertification.
>
> (Trial Trans. II 710:17-23).

3. JLS' Decertification Argument is Otherwise Unsupported

The remainder of JLS' decertification argument is a two-paragraph resuscitation of its unpreserved "due process" and "*de facto* class defendant" arguments but (1) JLS offers no

[27] This Order did not find that the "third-party defendants lacked standing" as JLS claims in its Brief. (JLS Brief, p. 35).

explanation as to why Horton naming JLS as a Third-Party Defendant constituted a "significant event" that somehow triggered "re-examination of the class previously certified" (JLS Brief, p. 36); and, (2) the Court did re-examine the class previously certified when it denied JLS' Motions to Decertify so this argument is moot.

V. All Other Procedurally Improper Grounds Also Fail on the Merits

JLS' other unpreserved arguments also fail substantively on the merits for the reasons stated below.

A. JLS' *Stoneledge* Defense (JLS Brief, pp. 20-24) Fails Because Horton Claimed Independent Damages and Any Purported Error by the Court is Harmless Given JLS Agreed to Conflate the Trial; JLS Agreed to the Jury Charges; and JLS Agreed to the Verdict Form

1. Horton's Damages are Independent of Indemnity

JLS' unpreserved indemnity argument fails because this case is distinguishable from both *Stoneledge* and *BEI-Beach* in that Horton did not concede in its Third-Party Complaint that its only damages resulted from Plaintiff's injuries. *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Se. Grp.*, 413 S.C. 630, 636, 776 S.E.2d 434, 437 (Ct. App. 2015) (finding that a general contractor's own allegations showed that its breach of warranty claim against a subcontractor was nothing more than an indemnity claim); *see also BEI-Beach, LLC v. Christman*, 440 S.C. 98, 108, 889 S.E.2d 601, 606 (Ct. App. 2023) (finding that a general contractor's own allegations "set forth no proper independent claim resulting from any breach of warranty"). The following chart comparing the damages alleged amongst these three cases is illustrative:

***Stoneledge* Third-Party Complaint**	***BEI-Beach* Third-Party Complaint**	**Horton's Third-Party Complaint**
Para. 174: **Should Plaintiffs prevail on their claims**, Marick will be damaged as a . . .result of [Clearview's] breach of their express and/or implied warranties; as a result, **Marick is informed and believes that it is entitled to recover from. . . Clearview. . .<u>such as it may incur. . .to pay to the Plaintiffs</u>** for which they sue.	Para. 28: **Lend Lease has incurred, and will continue to incur actual damages <u>in the amount of any money adjudged to be owed to the Plaintiff</u>** by Lend Lease, or which Lend Lease **<u>must pay Plaintiff in settlement of the Plaintiffs' claims</u>**. . .	Para. 87: If subcontractors' work was defective, subcontractors breached their contractual and common law duties to [Horton] and caused it damages as the time it performed its work. . .**Those damages include extra workload, <u>repair or repair costs of the defective work,</u> previous breaches of [JLS'] common law duties, express and implied warranties, and contractual relationships with other parties, <u>costs of investigation</u>, damage and harm to reputation. . .**

Here, unlike the general contractors in *Stoneledge* and *BEI-Beach*, Horton's breach of implied warranty claim against JLS was not contingent on whether Plaintiffs prevailed against Horton <u>and</u> Horton also alleged independent damages such as the costs it independently incurred in previously repairing and investigating JLS' work. (Horton's Third-Party Compl., pp. 24, 87) (including no contingent language in its breach of implied warranty claim against JLS and alleging Horton's independent damages). These monies that Horton <u>already paid</u> for, e.g., hiring engineers to inspect JLS' work or replacing masonry that JLS installed are not derivative of the <u>future</u> repair costs Plaintiff sought at trial.[28]

[28]JLS *Stoneledge* Motion (which the Trial Court never ruled upon) sought to dismiss "all claims with the exception of indemnity". JLS' Motion was not based on any specific rule and JLS did not submit any evidence to support it; rather, JLS relied on the pleadings. JLS' Motion therefore is akin to a 12(b)(6) Motion, and assuming, *arguendo*, this Court could consider this unpreserved issue, its review would be limited to only the allegations in Horton's Third-Party Complaint. These allegations plausibly entitle Horton relief on its breach of implied warranty claim as shown in the foregoing chart and therefore this claim is not subject to dismissal. *See, e.g., Wolman v. Tose,* 467

There was also evidence of these Horton-specific damages presented at trial including:

- Work orders and photos showing Horton self-performed repairs to JLS' brick and stone work (Pl. Exs. 11.16, 55, 56, 57, 58);

- Emails and letters showing Horton hired structural engineers to inspect JLS' brick work (Pl. Exs. 32.14, 32.15, 53, 54); (Def. Ex. 215); and

- The trial testimony of Class Representative, Natalie Zitek, during which she described Horton's many attempts to repair the brick walls surrounding her garage (Trial Trans. I 332:2-331:1; 334:21-335:5; 392:6-12; 397:2-17; 403:23-404:6);

The Trial Court therefore would have not erred in refusing to dismiss Horton's breach of implied warranty claim against JLS even if JLS had timely raised its *Stoneledge* argument. *Clegg*, 377 S.C. at 653, 661 S.E.2d at 796 (finding trial courts must deny motions to dismiss where the evidence and inferences therefrom show that there are "genuine issue[s] as to any material fact."). Moreover, JLS voluntarily began the defense of the third-party claim before Horton or its assignee were required to put on their evidence in support of the third party claim.

2. Any Error Committed by the Trial Court was Harmless

Even if *Stoneledge* was somehow applicable given the foregoing distinction, this Court should find that any error the Trial Court ***may*** have committed in failing to collapse Horton's breach of implied warranty claim into indemnity, or vice versa, is harmless for four principal reasons. *State v. Byers*, 392 S.C. 438, 448, 710 S.E.2d 55, 60 (2011) ("Error is harmless when it could not reasonably have affected the result of trial.").

First, the issue of whether JLS was liable under a warranty **or** indemnity theory was tried by consent to the jury as evidenced by the un-excepted jury charges, which are now the law of the case, and the agreed upon verdict form that specifically included a "breach of implied warranty"

F.2d 29, 33 n. 5 (4th Cir.1972) ("[A] complaint should survive a motion to dismiss it sets out facts sufficient for the court to *infer* that all the required elements of the cause of action are present.").

claim against JLS. (Trial Trans. II. 869:6-24); (Verdict Form); *see also Hope Petty Motors of Columbia, Inc.*, 310 S.C. at 175, 425 S.E.2d at 789 ("The failure to object to a jury instruction makes the charge the law of the case."); *CFRE, LLC,* 395 S.C. at 81, 716 S.E.2d at 885 ("A litigant cannot concede an issue at trial and then raise it on appeal.").

Second, this Court charged the jury as to both a general contractors and subcontractors' liability for building code violations and ultimately the jury found JLS liable. *See* (Trial Trans. II. 906:14-925-14); (Verdict Form).

Third, any "error" was caused by JLS who failed to assume the defense of Horton at trial, volunteered to the collapse of Phase I and Phase II at trial, and volunteered to put on the third-party defense before the third-party claim. (Trial Trans. II. 723:13-16).

Fourth, this was a unique situation calling for complex trial management decisions which have not been challenged and therefore cannot be overturned. (Complex Case Order).

B. JLS Standing Defense (JLS Brief, pp. 24-26) Fails for Similar Reasons

Like JLS' *Stoneledge* argument, JLS claims that Horton did not have standing to bring its breach of implied warranty claim because Horton has not suffered "any separate damage other than having to defend itself. . .and pay [Plaintiff]." (JLS Brief, p. 26). Horton did suffer separate damages, and evidence of these damages was presented at trial as detailed above.

Further, it is hornbook law that **any** contractor who performs work impliedly warrants that work to be merchantable, fit, and workmanlike. *See, e.g., Kennedy v. Columbia Lumber and Mfg. Co., Inc*., 299 S.C. 335, 344, 384 S.E.2d 730, 736 (1989) ("[A] builder who contracts to construct a dwelling impliedly warrants that the work undertaken will be performed in a careful, diligent, workmanlike manner."); (JLS Brief, p. 25) (JLS acknowledging that our Supreme Court found a general contractor had standing to bring a breach of implied warranty claim against its

subcontractors in construction defect cases). Additionally, Plaintiffs were assigned all of Horton's claims against JLS, thus standing exists by virtue of that assignment. *Fowler v. Hunter*, 380 S.C. 121, 126-27, 668 S.E.2d 803, 806-07 (Ct. App. 2008) (finding that it was erroneous to dismiss a claim on the basis that the claim was assigned by virtue of a settlement agreement).

JLS' focus on "redressability" is equally misplaced.[29] The only thing that Horton must prove is that the injury suffered will "likely be redressed by a favorable decision". *Sea Pines Ass'n for Prot. Of Wildlife, Inc. v. S.C. Dep't of Nat. Res.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001) (to satisfy redressability, "it must be likely, as opposed to merely speculative, that the injury will be 'redressed by a favorable decision.'"). The jury's verdict finding JLS liable for $4,000,000 is a favorable decision "redressing" some of Horton's $15,000,000 injury. *See* Verdict Form.[30]

Lastly, JLS agreed to the verdict form and therefore cannot complain that the jury was somehow "misled" by its inclusion of Horton's breach of implied warranty claim against JLS. (Verdict Form).

[29] JLS maintains that because Horton does not own these homes and cannot force the homeowners to fix their homes that Horton does not have standing to sue JLS for breach of implied warranty. (JLS Brief, pp. 24-25).

[30] JLS' argument incorrectly couches "redressability" in the context of the homeowners' injury as opposed to Horton's injury. Regardless, this result remains the same even if one analyzes redressability based on the homeowners' injury. There is a $15,000,000 unchallenged verdict which is a favorable decision "redressing" the homeowners $20,000,000 damage total requested during trial.

C. JLS' SOR Argument (JLS Brief, pp. 16-29) Fails Because JLS Contractually Extended the SOR for 10 Years; JLS Failed to Meet its SOR Evidentiary Burden; and Exceptions Bar the Applicability of the SOR

1. JLS Contractually Extended the SOR by Virtue of Its Contract with Horton

JLS' abandoned SOR argument fails because JLS contractually agreed to extend the warranty obligations it owed to Horton for **ten (10) years** and also agreed that "**all express and *implied* warranties** shall remain in full force and effect **for so long as** [Horton] is obligated to warrant the Work pursuant to applicable law. . ." (Pl. Ex. 1.8) (emphasis added).

JLS therefore extended any SOR applicable to Horton's breach of implied warranty claim against JLS here. *See* S.C. Code § 15–3–640 ("Nothing in this section prohibits a person from entering into a contractual agreement prior to the substantial completion of the improvement which extends any guarantee of a structure or component being free from defective or unsafe conditions beyond eight years after substantial completion of the improvement or component.") (emphasis added); *In re Bldg. Materials Corp. of Am. Asphalt Roofing Shingle Prods. Liab. Litig.,* No. 3:11-CV-02784 JMC, 2013 WL 1316562, at *4 (D.S.C. 2013) (plaintiff's negligence and breach of express and implied warranty claims survived defendant's SOR defense because the parties contractually extended the SOR).

Accordingly, JLS remains liable to Horton for breach of implied warranty for ten years from the applicable date of completion. The earliest certificate of occupancy that is in evidence in this case is dated July 7, 2013. *See* (Pl. Ex. 49, 104 Sturbridge CO). Thus, ten years from the earliest substantial completion date is July 7, 2023, meaning all warranty claims against JLS were brought well within the ten-year period, whether this Court uses Plaintiff's Complaint date,

September 25, 2019, Horton's Third-Party Complaint Date, March 11, 2021, or the JLS Answer date, March 9, 2022.

2. JLS Points to No Evidence that Supports its SOR Argument

JLS' Brief cites only two Exhibits, C and D, that it filed in support of its JNOV Motion to support its SOR argument. (JLS Brief, p. 29). Exhibit D, however, was never entered into evidence so this Court cannot consider it. Exhibit C, the stipulated Vendor Spend that Plaintiff introduced during trial as Pl. Ex. 247, does not show when any of the homes were substantially completed as JLS contends. Rather, this Vendor Spend shows when the subcontractors were paid; and the testimony provided at trial by Horton superintendent, Keith Waddell, indicated that the time Horton "finally paid" its subcontractors varied drastically depending on the subcontractors' warranty obligations. (Trial Trans. II. 536:16-537:8). JLS cannot and did not prove that these homes were completed eight (8) years prior to the filing of Horton's 2021 Third-Party Complaint and therefore has not met its SOR burden.

3. The Evidence Showed That the Gross Negligence and Other Exceptions Applied to Bar the Application of the SOR

i. Gross Negligence Exception

The Gross Negligence or Reckless Exception provides that the SOR cannot be asserted by "any person" who is grossly negligent or reckless:

> The limitations provided by Sections 15-3-640 through 15-3-660 are not available as a defense to a person guilty of fraud, gross negligence, or recklessness in providing components, in furnishing materials, in developing real property, in performing or furnishing the design, plans, specifications, surveying, planning, supervision, testing or observation of construction, construction of, or land surveying, in connection with such an improvement. . .

S.C. Code § 15–3–670(A) (emphasis added). This exception further provides: "[T]he violation of a building code. . .may be admissible as evidence of fraud, negligence, gross negligence, or

recklessness." S.C. Code § 15–3–670(B) (emphasis added) *See, e.g., Doe v. Greenville County Sch. Dist.,* 375 S.C. 63, 71, 651 S.E.2d 305, 309 (2007) *quoting Steinke v. S.C. Dep't of Labor, Licensing & Reg.,* 336 S.C. 373, 395, 520 S.E.2d 142, 153 (1999) ("Gross negligence is defined as the failure to exercise slight care. It has also been defined as 'the intentional, conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do.").

Here, JLS' own expert admitted that many building code violations exist in the masonry work JLS performed at these homes. (Trial Trans. II. 755:13-16) (JLS' expert conceding that all stone veneer needed to be removed and replaced due to its defective condition). This admission, alone, is proof of gross negligence by JLS, barring JLS from using the SOR defense for any claims. Note that JLS did not request a SOR or Gross Negligence Interrogatory from the juty to support this contention.

ii. Latent Damage Exception

The Latent Damage Exception provides that the SOR does not apply to "actions for property damage" in instances, like here, where the property damage is latent and the result of repeated exposure to an injury-producing substance:

> The limitation provided by Section 15-3-640 may not be asserted as a defense to an action for personal injury, including a personal injury resulting in death, or property damage which is:
>
> (1) by its nature not discoverable in the exercise of reasonable diligence at the time of its occurrence; and
>
> (2) the result of ingestion of or exposure to some toxic or harmful or injury producing substance, element, or particle, including radiation, over a period of time as opposed to resulting from a sudden and fortuitous trauma.

S.C. Code § 15–3–670(C) (emphasis added).

Here, there is evidence in the record that radon gas, the leading environmental cause of cancer, is potentially intruding into the interior of these homes. Plaintiff's expert, Dr. Whitlock, testified that radon could enter the homes through the cracks in concrete foundations that JLS improperly installed, and this was particularly problematic in this case because Anderson County is a radon "hot bed". (Trial Trans. I 643:22-644:9); *see also* (Pl. Exs. 25.17, 25.19, 25.28, 243) (Whitlock concrete/foundation crack photos). In fact, Dr. Whitlock was so concerned that he issued a Life Safety letter alerting the homeowners of the Radon risk in their homes. *Id.*

Radon is "invisible" and, as a carcinogen, it qualifies as an "injury producing substance, element, or particle, including radiation" based on the plain language of the statute. The damage caused by Radon exposure also occurs "over a period of time as opposed to resulting from a sudden and fortuitous trauma" as required by the statute. *See id.* ("[W]hen you breathe in radon gas, radioactive particles can get trapped in your lungs. Over time, these radioactive particles increase the risk of lung cancer. It may take years before health problems appear.").

The Latet Damage exception therefore bars JLS from asserting the SOR as a defense.

D. JLS's Due Process and *Defacto* Class Defendant Defense (JLS Brief, pp. 29-36) Fails Because JLS' Argument is Unsupported; JLS' Due Process Rights Were Not Violated; and the Trial Court Correctly Denied JLS' Many Decertification Motions

JLS' class-related arguments, like its *Stoneledge* and standing arguments, are essentially the same. JLS just recaptions its argument in separate subheadings even though JLS never made any of these arguments at trial and therefore they are unpreserved. Plaintiffs nevertheless point out why all these arguments fail on the merits below.

1. JLS' Argument That a New Rule 23 Class Analysis Was Required is Unsupported and Incorrect

JLS' Rule 23 argument relies on cases from other jurisdictions that have held that plaintiffs' addition of new defendants or new class allegations to their initial Complaints constitutes a commencement of a new suit for **the purposes of removal** under the Class Action Fairness Act ("CAFA"). *See, e.g., Braud v. Transp. Serv. Co. of Illinois*, 445 F.3d 801, 804 (5th Cir. 2006) (finding that plaintiffs' amended complaint, which named an additional defendant, was removeable as to that to co-defendant); *MG Bldg. Lowery v. Honeywell Int'l, Inc.*, 460 F. Supp. 2d 1288, 1292 (N.D. Ala. 2006) (same); *Materials, Ltd. v. Paychex, Inc*., 841 F. Supp. 2d 740, 746 (W.D.N.Y. 2012) (finding that plaintiffs' amended complaint, which newly asserted class allegations, was removeable).

Here, unlike these cases, Plaintiffs did not add JLS as a co-defendant, Plaintiffs did not assert any new class allegations, and there are no CAFA removal issues relevant to this appeal. JLS has not identified any persuasive authority that provides a general contractor's addition of a Third-Party Defendant after a homeowner's claims against the general contractor have been certified requires yet another certification. (JLS Brief, pp. 30-31). JLS' argument is entirely unsupported (and a bit tangential, to be polite) and this Court should find the same.

2. The Trial Court Conducted a Rule 23 Analysis After JLS was Added as a Third-Party Defendant

This Court should also find that JLS' Rule 23 argument is moot. (JLS Brief, pp. 29-32). JLS argues in its Brief that "the trial court was required to determine the propriety of the previously certified class against D.R. Horton ***or*** undertake a separate class-action analysis with respect to D.R. Horton's claims against JLS" after JLS was named as a Third-Party Defendant in this case. (JLS Brief, p. 31) (emphasis added). Here, the Trial Court reassessed "the propriety of the" class

after JLS was named when it denied JLS' three Motions to Decertify. (July 19, 2023 Form 4 Order Denying Defendant and Third/Fourt Party Defendants' Motions to Decertify) (finding Plaintiff continued to satisfy the Rule 23's requirements). JLS has already received the relief it newly seeks.

3. JLS' Due Process Rights Were Not Violated

This Court should also find that JLS' due process rights were not violated because the Trial Court heard JLS' certification challenges; decided to reject them; and that's all "due process" requires. *Moore v. Moore*, 376 S.C. 467, 657 S.E.2d 743 (2008) (Procedural "[d]ue process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses.").

4. JLS' "Zitek Claims are Subject to Class Treatment" Argument is Moot

This Court should find that JLS' "class treatment" argument is also moot for three reasons. (JLS Brief, pp. 32-34). First, it relies on the 2021 Certification Order and the 2023 Trial Plan Order that JLS does not appeal. (Notice of Appeal). Second, JLS claims that "imputing class evidence and damages to JLS was reversible error" but fails to cite any such evidence or damages imputed. (JLS Brief, p. 34). Third, JLS cannot claim "error" when it agreed to "collapse" Phase 1 and Phase 2 of Trial and failed to object to the evidence entered in either Phase. (Trial Trans. II. 723:13-16).

E. JLS' Bifurcation and Trial Plan Related Arguments (JLS Brief, pp. 37-39) Fail for Similar Reasons

JLS' bifurcation-related arguments are duplicative of the foregoing and fail for similar reasons. JLS argues that it moved for a bifurcated trial and that "the trial of Zitek's class claims should be bifurcated from D.R. Horton's claims against the non-class third-party Defendants". (JLS Brief, p. 37). The Trial Court, however, did bifurcate the trial in this manner according to its Trial Plan Order which, again, JLS failed to appeal. (Notice of Appeal).

JLS goes on to argue that "contrary to the [unappealed] Trial Plan" that the Trial Court "required Phase II to begin before a verdict had been reached as to Zitek's damages" and the Trial Cout "allowed Phase II to begin without any clarification/curative instruction to the jury regarding the distinct class claims". (JLS Brief, p. 37). Yet, again, JLS is ignoring the fact that it consented to (and arguably suggested) the "collapse" of Phase I and Phase II, the jury charges, and the verdict form. (Trial Trans II. 723:13-16); (Trial Trans. II. 869:17-24).

JLS next argues that the Trial Court's failure "to give correct instructions" and "to bifurcate" the trial "unduly prejudiced JLS" without pointing to single prejudice JLS suffered. (JLS Brief, p. 39).

JLS also argues that the Trial Court "acknowledged JLS was not a class member and therefore had no standing to move for decertification" but cites no Order where the Court made such a finding. (JLS Brief, p. 37). Rather, JLS cites Plaintiffs' Counsel's arguments made in connection with the Trial Plan Order which JLS also failed to appeal. (JLS Brief, p. 34).

JLS next cursorily states that the "continuation of this case without re-examination of the class constituted an unjust…imputation of the class and class damages onto JLS", (JLS Brief, p. 38), but JLS points to no evidence that anything was "imputed". *Id*.

JLS then argues that "JLS substantially completed all of its work by 2014" so that its limitations defense is different that Horton's but JLS only argued the SOL as to Plaintiffs' claims and cites no legitimate evidence supporting its SOR argument as to Hortons' claims. *See* Section IV (A), *supra*.

JLS finally argues that the Trial Court "was required to disclose the Plaintiff and Horton settlement before commencing Phase II" and to "instruct the jury regarding this settlement". (JLS

Brief, pp. 40-41). The Trial Court was not, however, required to do so for the reasons already explained in Section IV (C), *supra.*

VI. JLS Cannot Challenge the Jury's Verdict Because the Verdict Falls Within the Damage Range Established by the Evidence

JLS's New Trial argument (JLS Brief, p. 42-44) is also substantively without merit because the jury's verdict is neither grossly excessive nor influenced by matters outside of what was presented during trial. JLS offers no "compelling reasons" as to why the Court should disturb the jury's verdict and therefore has not met its burden to show a new trial is warranted. *Chapman v. Upstate RV & Marine*, 364 S.C. 82, 89, 610 S.E.2d 852, 856 (Ct. App. 2005) ("Compelling reasons, however, must be given to justify invading the jury's province in this manner.").

JLS cannot meet its burden because the evidence, stipulated to by JLS, provided the jury with a total "damage range" between $1,700,000 and $20,000,000, and 46% of the work being performed by JLS. The jury's $15,000,000 verdict against Horton and $4,000,000 verdict against JLS both fall well within this range, and thus, are not "excessive". *Wright*, 372 S.C. at 36, 640 S.E.2d at 505 ("When a verdict falls within the range of the evidence, the courts will not disturb it on the ground of excessiveness."); *Collins Music Co., Inc. v. Smith*, 332 S.C. 145, 148, 503 S.E.2d 481, 482 (Ct. App. 1998) (refusing to alter an award because the verdict was within the range of amounts given during testimony at trial). As such, this Court should uphold the jury's verdict to effectuate the jury's express intentions.

It is apparent that the jury's verdict is not only within the damage range, but also reasonable based upon the law and evidence presented at trial. Further, there is no prejudicial error in the admission of any evidence and no prejudicial error in the un-excepted charges read to the jury. *See, e.g.,* Rule 51, SCRCP ("No party may assign as error the giving or the failure to give an

instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection."); *Dalon v. Golden Lanes*, 320 S.C. 534, 540, 466 S.E.2d 368, 372 (Ct. App. 1996) ("In order to warrant reversal for failure to give a requested charge, the refusal must be both erroneous and prejudicial.").

CONCLUSION

In sum, this Court should affirm every Trial Court Order JLS appeals because JLS failed to properly preserve any of the arguments it now asserts; JLS failed to make a proper DV Motion that was ruled upon during trial; and JLS failed to challenge the January 2021 Order Granting Class Certification and the August 2023 Trial Plan Order.

Even if this Court could consider JLS' arguments related to decertification, the SOL, Plaintiffs' damages, and settlement disclosure, this Court should find that these arguments are moot because (1) JLS does not appeal Plaintiffs' $15,000,000 verdict against Horton and (2) JLS abandoned any challenge it may have had to Horton's $4,000,000 verdict against it by agreeing to the jury charges and verdict form.

This Court should further find that these arguments also fail on the merits for the many reasons outlined above, or alternatively, that any error committed by the Trial Court was harmless because it was JLS who caused the "collapse" of this trial and cannot show any prejudice it suffered as a result.

[SIGNATURE ON NEXT PAGE]

JUSTIN O'TOOLE LUCEY, P.A.

s/ Dabny Lynn

Justin O'Toole Lucey (SC Bar # 15438)
Dabny Lynn (SC Bar # 78703)
Charlotte B. Winckler (SC Bar # 102862)
415 Mill Street (29464)
Post Office Box 806
Mount Pleasant, SC 29465-0806
(843) 849-8400
jlucey@lucey-law.com
dlynn@lucey-law.com
cwinckler@lucey-law.com
Attorneys for Plaintiff

September 12, 2024
Mount Pleasant, South Carolina

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable R. Scott Sprouse
Circuit Court Judge

Appellate Case No.: 2024-000057
Circuit Court Case No.: 2019-CP-04-01942

Natalie Zitek, individually, and on behalf of all others similarly situated,

Plaintiff,

v.

D.R. Horton, Inc., Jane Doe #1-10; and John Doe #1-50,

Defendants,

and

D.R. Horton, Inc.,

Third-Party Plaintiff,

v.

A&J Framing, Inc.; A-z, Inc.; AJ Landscaping & Grading, LLC, a/k/a AJ Landscaping & Grading, LLC; Allpro Textures, LLC; Alpha E.M.C.; Alpha Omega Construction Group, Inc.; American Concrete and Precast, Inc., a/k/a ACP Concrete, Inc.; Atlanta Floor Designs Center; A Grade Above Others, LLC; BFK Builders, Inc.; BMC East, LLC d/b/a Coleman Floor, LLC; Brand-Vaughn Lumber Co., Inc.; Bravo Carpenters, Inc.; Builders Designhouse, LLC; Builders FirstSource Southeast Group, LLC, a/k/a Builders FirstSource, Inc.; Builders Services Group, LLC, f/k/a Masco Contractor Services Central, Inc., f/k/a Gale Industries, Inc., d/b/a Gale Contractor Services; Cannaday Siding & Gutter, Inc.; Caryl Mechanics II, Inc., a/k/a Caryl Mechanicals, Inc.; CBU Enterprises, Inc.; Cortes Painting, LLC; CPI Security Systems, Inc.; Dom

Group, LLC; Dupree Plumbing Company, Inc.; Ferguson Enterprises, Inc.; Five Star Construction, Inc.; Five Star Foundations, LLC; Galloway-Bell, Inc., a/k/a Galloway-Bell, Inc. II; GBS Building Supply – US LBM, LLC, f/k/a GBS Building Supply, Inc.; General Shale Brick, Inc.; Get Floored, LLC; Greener Pastures, Inc., a/k/a Greener Pastures of Aiken, LLC; Installed Building Products, LLC, a/k/a Installed Building Products II, LLC; IBP Asset, LLC, d/b/a/ Blue Ridge Building Products; JLS Masonry, Inc.; Kings Landscaping, LLC; L&M Products, Inc; Long Heating & Air Conditioning, Inc.; M&L General Construction, LLC; M&M Foundations, LLC; Manale Landscaping, LLC; MJ Cowboys, LLC; Nazareth Builders, LLC; NM Contractors, LLC; Poinsett Development, LLC; Poinsett Homes, LLC; P&L Enterprises, LLC; P&T Construction, Inc., a/k/a P&T Construction, Inc.; ProBuild Company, LLC, a/k/a ProBuild Holdings, Inc.; Rite Rug Co.; Rodney Howard Grading, Inc., a/k/a Rodney Howard Grading Co.; Sandlapper Concrete, LLC; Silver Line Building Products Corporation; Sodfather, Inc.; Landscape Contractors; Stock Building Supply, LLC; Topbuild Home Services, Inc., a/k/a Gale Contractor Service; Tucker Materials, Inc., a/k/a Gypsum; UTM Enterprises, Inc.; and Willow Tree Landscpaing, Inc.,

Third-Party Defendants,

and

Aaron D. Peris; Harrelson Painting, LLC; Huttig Building Products,

Fourth and Fifth Party
Plaintiffs and Defendants,

Of whom

JLS Masonry, Inc., is the

Appellant,

v.

Natalie Zitek, individually, and on behalf of all others similarly situated and as assigned of the claims of Third-Party Plaintiff D.R. Horton, Inc.,

Respondents.

PROOF OF SERVICE

I certify that on September 12, 2024, a copy of Respondents' Initial Brief was served on all counsel of record via email as listed below:

Nosizi Ralephata, Esquire
Julie Fekete, Esquire
Gordon Rees Scully Mansukhani
677 King Street, Suite 450
Charleston, SC 29403
nralephata@grsm.com
jfekete@grsm.com

Jeffrey A. Ross, Esquire
Ross & Cristaldi
863 Coleman Blvd., Suite B
Mt. Pleasant, SC 29464
jross@rclawsc.com

Attorneys for Appellant JLS Masonry, Inc.

JUSTIN O'TOOLE LUCEY, P.A.

s/ Dabny Lynn

Justin O'Toole Lucey (SC Bar # 15438)
Dabny Lynn (SC Bar # 78703)
Charlotte B. Winckler (SC Bar # 102862)
415 Mill Street (29464)
Post Office Box 806
Mount Pleasant, SC 29465-0806
(843) 849-8400
jlucey@lucey-law.com
dlynn@lucey-law.com
cwinckler@lucey-law.com
Attorneys for Plaintiff

Mount Pleasant, South Carolina